REVISED PROPOSED AMENDMENT: MONEY LAUNDERING
(Proposed Amendment 20 of User Friendly, Volume II)

Synopsis of Proposed Amendment:

Overview

The proposed amendment consolidates the two current money laundering guidelines, §§2S1.1 and 2S1.2, and applies to convictions under either 18 U.S.C. § 1956 or §1957. The structure of the amendment ties offense levels for money laundering more closely to the underlying criminal conduct that was the source of the criminally derived funds. The amendment accomplishes this objective by separating money laundering offenders, regardless of the statute of conviction, into two categories for purposes of determining the base offense level. The base offense level is determined differently, depending on whether the defendant is a "direct" or a "third party" money launderer (money launderers who commit the underlying offense which generated the criminal proceeds versus money launderers who did not commit the underlying offense). Specific offense characteristics are included in this proposed amendment to increase the total offense level in order to assure greater punishment for those money laundering defendants whose conduct is considered more serious and harmful to the societal interests which the money laundering laws are designed to protect.

Base Offense Level

Subsection (a) provides two distinct methods for determining the base offense level, depending on whether the defendant is a "direct" money launderer or a "third party" money launderer. Subsection (a)(1) sets the base offense level for "direct" money launderers at the offense level for the underlying offense from which the laundered funds were derived (i.e., the base offense level and all applicable specific offense characteristics for the underlying offense), if the offense level for the underlying offense can be determined. A data analysis of a representative sample of 259 money laundering cases conducted by the Commission indicated that subsection (a)(1) would apply to 86 percent of defendants sentenced under the guideline (i.e., "direct" money launderers comprise 86 percent of the money laundering defendants).

This proposed amendment excludes from application of subsection (a)(1) offenders who otherwise would be accountable for the underlying offense solely on the basis of §1B1.3(a)(1)(B) (i.e., jointly undertaken criminal activity). However, this limitation has minimal practical consequence. Commission data indicate that less than one percent of defendants who would not be categorized as "direct" money launderers because of this limitation would be subject to subsection (a)(1) if it were expanded to include defendants who would be otherwise accountable for the underlying offense under §1B1.3(a)(1)(B).

For "third party" money launderers (i.e., defendants who did not commit or would not be

accountable for the underlying offense under §1B1.3(a)(1)(A)), subsection (a)(2) sets the base offense level at level eight, plus an increase based on the value of the laundered funds from the table in subsection (b)(1) of §2F1.1 (Fraud and Deceit). Subsection (a)(2) also applies to "direct" money laundering defendants for whom subsection (a)(1) would apply but the offense level for the underlying offense is impossible or impracticable to determine. The data analysis conducted by the Commission indicates that "third party" money launderers comprise approximately 16 percent of the money laundering defendants.

Adjustments

In addition to the base offense level, the proposed amendment contains a number of adjustments. These enhancements are designed to ensure that all "direct" money launderers receive additional punishment for committing both the money laundering offense and the underlying offense. In addition, the enhancements provide incremental increases to account for the differing seriousness of the aggravating conduct.

Subsection (b)(1) provides a [6] level enhancement for "third party" money launderers who know or believe that any of the laundered funds were the proceeds of, or were intended to promote, certain types of more serious underlying criminal conduct; specifically, drug trafficking, crimes of violence, offenses involving firearms, explosives, national security, terrorism, and the sexual exploitation of a minor. This enhancement recognizes that defendants who knowingly launder the proceeds of these more serious underlying offenses are substantially more culpable than "third party" money launderers of criminally derived proceeds of less serious underlying offenses. The data analysis conducted by the Commission indicates that this enhancement will apply in 83 percent of all "third party" money laundering cases (and 12 percent of all money laundering cases).

Subsection (b)(2) provides three alternative enhancements, with the greatest applicable enhancement to be applied. Subsection (b)(2)(A) provides a [1] level increase if the defendant was convicted under 18 U.S.C. § 1957. Subsection (b)(2)(B) provides a [2] level increase if the defendant was convicted under 18 U.S.C. § 1956. Subsection (b)(2)(C) provides a [4] level increase if the defendant is a "third party" money launderer who is "in the business" of laundering funds. This adjustment reflects the view that, similar to a professional "fence" (see §2B1.1(b)(4)(B)), defendants who routinely engage in laundering funds on behalf of third parties and who gain financially from engaging in such transactions warrant substantial additional punishment because they encourage the commission of additional underlying criminal offenses. Application Note 4 directs the court to consider the totality of the circumstances in determining whether a defendant was in the business of laundering funds and provides a non-exhaustive list of factors that typically indicate the defendant was in the business of laundering funds for purposes of subsection (b)(2)(C).

Subsection (b)(3) provides an additional [2] level increase if subsection (b)(2)(B) applies and the offense involved sophisticated laundering because such offenses are viewed as more serious

money laundering offenses than less sophisticated money laundering conduct. Application Note 5 defines sophisticated laundering as "complex or intricate" offense conduct pertaining to the execution or concealment of the 18 U.S.C. § 1960 offense and lists the use of fictitious entities, the use of shell corporations, creating two or more levels of transactions, and the use of offshore bank accounts as typically being indicative of sophisticated laundering. The data analysis conducted by the Commission indicate that this enhancement will apply in approximately 55 percent of money laundering cases.

Application Note 7 provides instructions regarding the grouping of multiple counts of money laundering with a conviction for the underlying offense. In a case in which the defendant is to be sentenced on a count of conviction for money laundering and a count of conviction for the underlying offense that generated the laundered funds, this application note instructs that such counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts), thereby resolving a circuit conflict on this issue.

The proposed amendment provides that convictions under 18 U.S.C. § 1960 (Illegal Money Transmitting Businesses; failure to obtain appropriate licenses or comply with registration requirements for money transmitting businesses) be referenced to §2S1.3 (Structuring Transactions to Evade Reporting Requirements). Operation of money transmitting businesses without an appropriate license is proscribed by 18 U.S.C. § 1960, as are failures to comply with certain reporting requirements issued under 31 U.S.C. § 5330. These regulatory requirements serve many of the same purposes as the Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments over $10,0000 Received in a Trade or Business that currently are covered by §2S1.3. Accordingly, violations of 18 U.S.C. § 1960, including violations of regulations prescribed under 31 U.S.C. § 5330, are properly referenced to §2S1.3.

Sentencing Impact

Commission staff reviewed a representative sample of 259 money laundering cases from the entire population of 1,016 money laundering cases sentenced in fiscal year 1999 for convictions under the two primary money laundering statutes, 18 U.S.C. §§ 1956 and 1957. Cases were selected for review based on their representativeness of the entire population of money laundering offenders. (The Commission's Monitoring Data indicates that 30 percent of these 1,016 defendants had money laundering convictions only, 32 percent had companion drug convictions, 10 percent had companion fraud convictions, and 28 percent had companion conspiracy convictions under 18 U.S.C. § 371.)

Cases selected for the sample generally mirror this distribution. Consistent with the structure of the proposed amendment, the impact analysis references the loss table in § 2F1.1 (Fraud) in computing the base offense levels for two types of money laundering defendants: 1) "direct" money launderers with fraud-related underlying offense conduct and 2) third-party

launderers. ***The sentencing impact analysis assumed that the Commission adopts proposed Option 2 to the loss table.*** *If this assumption proves incorrect, there will be some corresponding changes to the results of this impact analysis.*

Under the proposed amendment, the average prison sentence will increase from 74 to 97 months, an increase of 27 percent. These aggregate results, however, do not fully capture the varying degrees that the impact would have on different types of money laundering offenders.

Sentences for laundering proceeds derived from drug related conduct generally will increase. There were 35 "direct" launderers of drug proceeds that were re-sentenced using the prison impact computer model. All 35 of these "direct" money launderers would receive increased sentences under the amendment. The average sentence for "direct" launderers of drug proceeds would increase from 121 months to 158 months, a 30 percent increase.

There were 29 "third party" launderers of drug proceeds that were re-sentenced using the prison impact computer model. Of these, 21 would receive increased sentences under the amendment, and eight would receive lower sentences. The average sentence for "third-party" launderers of drug proceeds would increase from 30 months to 53 months, a 76 percent increase. (For those 8 defendant who would receive lower sentences, their average sentence would decrease by 7 months from 26 months to 19 months. The decreases primarily are attributable to the fact that the average value of funds laundered by this group of 8 offenders is relatively low—$31,605. No information on drug type or amount is available for these offenders because they did not commit the underlying drug offense.)

With respect to "direct" launderers of fraud proceeds, 64 offenders were re-sentenced using the prison impact computer model. The average sentence for "direct" launderers of fraud proceeds increased from 67 to 84 months, an increase of 25 percent. Again, this aggregate result does not fully capture the varying degrees of impact that the amendment will have on different types of fraud offenders.

Of the 64 "direct" fraud offenders, 46 (72 percent) would receive increased sentences under the amendment. For those who would receive increased sentences, the average sentence would increase from 70 months to 104 months, a 48.6 percent increase. The increase in sentences for this group of offenders primarily is attributable to the large loss amounts caused by the underlying fraud offense, a median of $1.6 million. The loss amount and corresponding increase from the fraud loss table will drive the base offense level calculation for money laundering offenses under the amendment. By comparison, the value of the of funds laundered serves as the measure of the enhancements under the current money laundering guideline, and the median value of funds laundered for this group of offenders is $497,267.

Of the 18 "direct" fraud offenders who would receive decreased sentences under the

amendment, the average sentence would decrease from 68 to 49 months, a 28 percent decrease. The decrease in sentences for this group of offenders primarily is attributable to the relatively lower loss amounts caused by the underlying fraud offense, a median of $176,000, that would be used to calculate the base offense level under the amendment.

There was an insufficient sample (2) of "third party" fraud money launderers to conduct a prison impact analysis for this group of offenders.

Proposed Amendment:

Strike §§2S1.1 and 2S1.2 and insert the following:

§2S1.1 <u>Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity</u>

(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under §1B1.3(a)(1)(A) (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) **8** plus the number of offense levels from the table in subsection (b)(1) of §2F1.1 (Fraud and Deceit) corresponding to the value of the laundered funds, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense (or would not be accountable for the underlying offense under §1B1.3(a)(1)(A) (Relevant Conduct)); and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, terrorism, or the sexual exploitation of a minor, increase by [**6**] levels.

(2) (Apply the greatest):

(A) If the defendant was convicted under 18 U.S.C. § 1957, increase by [**1**] level.

(B) If the defendant was convicted under 18 U.S.C. § 1956, increase by [**2**] levels.

(C) If (i) subsection (a)(2) applies because the defendant did not commit the underlying offense; and (ii) the defendant was in the business of laundering funds, increase by [**4**] levels.

(3) If (A) subsection (b)(2)(B) applies; and (B) the offense involved sophisticated laundering, increase by [**2**] levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1956, 1957.

Application Notes:

1. Definitions.—For purposes of this guideline:

"Crime of violence" has the meaning given that term in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in §4B1.1).

"Criminally derived funds" means any funds derived, or represented by a law enforcement officer or by another person at the direction or approval of an authorized Federal official, to be derived from conduct constituting a criminal offense.

"Laundered funds" means the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. § 1956 or § 1957.

"Laundering funds" means the making of a transaction, financial transaction, monetary transaction, or transmission, or the transporting of, property, funds, or a monetary instrument in violation of 18 U.S.C. § 1956 or § 1957.

"Sexual exploitation of a minor" means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse sexual abuse, or abusive sexual contact, involving a minor. "Minor" means an individual under the age of 18 years.

2. Application of Subsection (a)(1).—

(A) Multiple Underlying Offenses.— In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to §1B1.5 (Interpretation of References to Other Guidelines).

(B) *Defendants Accountable for Underlying Offense.*——*In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense under §1B1.3(a)(1)(A) (Relevant Conduct). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.*

3. *Application of Subsection (a)(2).—*

(A) *In General.—Subsection (a)(2) applies to cases in which (i) the defendant did not commit the underlying offense; or (ii) the defendant committed the underlying offense (or would be accountable for the underlying offense under §1B1.3(a)(1)(A) (Relevant Conduct)), but the offense level for the underlying offense is impossible or impracticable to determine.*

(B) *Commingled Funds.—In a case in which a transaction, financial transaction, monetary transaction, transportation, transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.*

4. *Enhancement for Business of Laundering Funds.—*

(A) *In General.—The court shall consider the totality of the circumstances to determine whether a defendant who did not commit the underlying offense was in the business of laundering funds, for purposes of subsection (b)(2)(C).*

(B) *Factors to Consider.—The following is a non-exhaustive list of factors that may indicate the defendant was in the business of laundering funds for purposes of subsection (b)(2)(C):*

(i) *The defendant regularly engaged in laundering funds.*

(ii) *The defendant engaged in laundering funds during an extended period of time.*

(iii) *The defendant engaged in laundering funds from multiple sources.*

(iv) *The defendant generated a substantial amount of revenue in return for laundering funds.*

(v) At the time the defendant committed the instant offense, the defendant had one or more prior convictions for an offense under 18 U.S.C. § 1956 or § 1957, 31 U.S.C. §§ 5313, 5314, 5316, 5324 or 5326 or any similar offense under state law, or an attempt or conspiracy to commit any such federal or state offense. Prior convictions taken into account under subsection (b)(2)(A) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History)[; and.

[(vi) Representations made by the defendant during the course of a government sting operation].

5. Application of Subsection (b)(3).—

(A) Sophisticated laundering.—For purposes of subsection (b)(3), "sophisticated laundering" means complex or intricate offense conduct pertaining to the execution or concealment of the 18 U.S.C. § 1956 offense.

Sophisticated laundering typically involves:

(A) the use of fictitious entities;

(B) the use of shell corporations;

(C) creating two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, of criminally derived funds that were intended to appear legitimate; or

(D) the use of offshore bank accounts.

(B) Non-Applicability of Enhancement. —If subsection (b)(3) applies, and the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense is the only conduct that forms the basis for application of subsection (b)(3) of this guideline, do not apply the subsection (b)(3) enhancement under this guideline.

6. Grouping of Multiple Counts.—In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts).

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§2S1.3. Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports

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Commentary

Statutory Provisions: 18 U.S.C. § 1960; 26 U.S.C. § 7203 (if a violation based upon 26 U.S.C. § 6050I), § 7206 (if a violation based upon 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316, 5324, 5326. For additional statutory provision(s), see Appendix A (Statutory Index).

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 1956	2S1.1
18 U.S.C. § 1957	~~2S1.2~~2S1.1
18 U.S.C. § 1958	2E1.4
18 U.S.C. § 1959	2E1.3
18 U.S.C. § 1960	2S1.3
18 U.S.C. § 1962	2E1.1

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~~31 U.S.C. § 5322~~	~~2S1.3~~
31 U.S.C. § 5324	2S1.3
31 U.S.C. § 5326	2S1.3, 2T2.2
33 U.S.C. § 403	2Q1.3

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Conforming Amendments:

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

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Commentary

Application Notes:

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6. A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. ~~For example, in §2S1.1 (Laundering of Monetary Instruments), subsection (a)(1) applies if the defendant "is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)."~~ For example, in §2S1.1 (Laundering of Monetary Instruments), subsection (b)(2)(B) applies if the defendant "is convicted under 18 U.S.C. § 1956." Unless such an express direction is included, conviction under the statute is not required. Thus, use of a

statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense was committed by the means set forth in 18 U.S.C. § 2242").

An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. ~~*For example, §2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).*~~ *For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956 would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956.*

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§3D1.2. Groups of Closely Related Counts

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(d) * * *

Offenses covered by the following guidelines are to be grouped under this subsection:

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§§2S1.1, ~~2S1.2,~~ 2S1.3;

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§8C2.1. Applicability of Fine Guidelines

The provisions of §§8C2.2 through 8C2.9 apply to each count for which the applicable guideline offense level is determined under:

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§§2S1.1~~, 2S1.2,~~ 2S1.3;

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§8C2.4. Base Fine

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Commentary

Application Notes: * * *

5. Special instructions regarding the determination of the base fine are contained in §§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors)~~; 2S1.1 (Laundering of Monetary Instruments); and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity)~~.

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Background: Under this section, the base fine is determined in one of three ways: (1) by the amount, based on the offense level, from the table in subsection (d); (2) by the pecuniary gain to the organization from the offense; and (3) by the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly. In certain cases, special instructions for determining the loss or offense level amount apply. As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2.5 (Culpability Score), they will result in guideline fine ranges appropriate to deter organizational criminal conduct and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances. Chapter Two provides special instructions for fines that include specific rules for determining the base fine in connection with certain types of offenses in which the calculation of loss or gain is difficult, e.g., price-fixing ~~and money laundering~~. For these offenses, the special instructions tailor the base fine to circumstances that occur in connection with such offenses and that generally relate to the magnitude of loss or gain resulting from such offenses.